The Letter of Intent Is One of the Most Important Documents in an Aircraft Sale Transaction and Should Not be Skipped or Given Short Shrift

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I have now been practicing law for 43 years, with a specific focus on aviation law and aircraft transactions for the past 32 years, and those decades of experience have led me to certain strongly held convictions about how a well-managed aircraft sale or purchase is conducted and one of those conclusions is this – the Letter of Intent ("LOI") can be one of the most important documents in any successful aircraft transaction and the LOI ought to be given much more attention and care than it generally receives.

I know that some aircraft brokers do not share my feeling about LOIs and I appreciate their point of view, but over the years, I have seen how useful a well-drafted and comprehensive LOI can be in setting the stage for a successful and amicable transaction and closing. I've also seen how contentious a negotiation can become, particularly when it comes to drafting the aircraft sale or purchase agreement, if the LOI is hastily drafted and poorly written or incomplete.

Many brokers prefer a very simple LOI, in part because they believe it's important to sustain the momentum of a transaction and to keep it moving forward rapidly to closing. For some, the mindset is "delay kills deals" – sometimes translated to "lawyers kill deals." I don't agree with that perspective. I've only known a few attorneys in all my years of practice who I truly regarded as aircraft "deal-breakers." That being said, I'll readily acknowledge that lawyers are schooled to be cautious and trained to think about the potential consequences of decisions gone awry. Experienced aviation lawyers can draft an LOI quickly, but we generally want to make certain that we not only capture all of the deal points, but also include all the provisions that we know ought to be incorporated into the final sale or purchase agreement. Yes, you must identify the parties, the aircraft and the price, but it's also important to understand how much of a deposit the buyer will have to place into escrow, when that deposit goes "hard" (i.e., becomes non-refundable), what sort of pre-purchase inspection the buyer will be allowed to conduct and where it will be performed, what the return-to-service and delivery conditions will be, what the seller's responsibilities will be if the inspection facility identifies deficiencies with the aircraft, what buyer's rights will be if seller doesn't rectify the discrepancies, when and where the closing will take place, who pays to get the aircraft to the closing location and what happens if any of the conditions of the contract cannot be fulfilled due to the failure of either the seller, or the buyer, or conditions beyond either parties' control. It makes far more sense to flesh these matters out at the LOI stage than to wait for the drafting of the purchase or sale contract.

More often than not, an LOI is drafted to be "non-binding," that is the terms of the document do not constitute an enforceable contract that either party could take to a court of law to seek an injunction to enforce specific performance or an award of damages for non-performance. Notwithstanding the preference for non-binding LOIs, parties will sometimes still choose to make certain provisions of an LOI binding, most often clauses imposing an obligation of confidentiality on both parties regarding the terms and especially the price if negotiations are ultimately unsuccessful.

Since the first of the year, I've seen one transaction that collapsed completely because the parties ultimately could not agree on the terms of the LOI and another that nearly failed as the negotiations went back-and-forth over what the LOI should say and both sides repeatedly changed what they were willing to offer or accept. In some ways, these negotiations were frustrating, but what they revealed, as they unfolded, was that the parties had not yet truly achieved what the law refers to as a "meeting of the minds," i.e., the minimum level of agreement between two parties as to the elements of a transaction necessary to create an enforceable contract. Yes, they agreed they wanted to sell an airplane, but neither side had thought through the ramifications of everything that would be involved in making that happen to the degree necessary to get an aircraft sale contract signed – and I submit that it's far better to figure that out at the LOI stage than to have negotiations break down a couple weeks later when parties already have begun to incur significant expense, including lawyers' fees, the cost and inconvenience of having the principal travel to a remote location to see the airplane, retaining an expert to perform a preliminary visual inspection and records review, liquidating cash to put up the deposit in escrow and a significant expenditure of broker time on a deal that isn't going anywhere.

In the proposed transaction that collapsed, I found myself negotiating, not with another attorney, but with a broker who insouciantly rejected my first draft of the LOI and told me "I like to keep LOIs very short and simple and leave all those issues for later." I told the broker that while that was not my preferred approach, I would share his viewpoint with my client and take instructions on how to proceed. The client wanted to get the deal done and told me to keep negotiating – but the longer we went and the more drafts we traded, the more obvious it became that the parties simply did not see eye-to-eye and would never be able to get a purchase contract signed. We finally ended those negotiations – and my client's broker soon ended up finding another aircraft that our client was able to purchase – thanks, in part, to our ability to negotiate a comprehensive and mutually acceptable LOI that was quickly converted into a final contract.■

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